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March 19, 1984

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Mr. Earl M. Sweeney, Deputy Commissioner
Department of Safety
Hazen Drive
Concord, New Hampshire 03301

Re: Application of RSA 91-A to Videotapes of Autopsies
Conducted in Fatal Accident Investigations

Dear Mr. Sweeney:

You have asked whether the videotape of an autopsy of a fatal accident victim which is made by the Division of Motor Vehicle's fatal accident analyst is a public record subject to disclosure under RSA Ch. 91-A, the Right to Know Law. Our response is that such a videotape is a confidential medical record, the disclosure of which could constitute an invasion of privacy, and is therefore not generally available for inspection by the public under RSA 91-A:4.

As you know, the Right to Know Law requires disclosure of all public records which are not specifically exempt by statute or case law. A videotape prepared or created by a state agency in the course of its normal functions is not outside the scope of materials subject to disclosure simply because it is a tape rather than a written document. See, Menge v. City of Manchester, 113 N.H. 533 (1973). Thus, both the audio and video portions of a videotape of an autopsy made by the Division of Motor Vehicles constitute public records subject to disclosure unless specifically exempt.

The legislature has specifically recognized that certain public records should not be made available for public inspection. Thus, RSA 91-A:5, IV provides for the exemption from

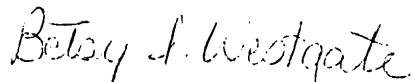


disclosure of "confidential, medical ... and other files whose disclosure would constitute an invasion of privacy." To determine whether records sought are exempt as medical or other confidential information, the benefits of disclosure to the public are to be weighed against the benefit of nondisclosure to the public body. Mans v. Lebanon School Board, 112 N.H. 160 (1972). We believe that the videotape of an autopsy of a fatal accident victim prepared by the fatal accident analyst of the Division of Motor Vehicles is exempt under RSA 91-A:5 because the information contained in the record is of a medical nature and is subject to certain privacy rights of the decedent or his family. In addition, the information is in many instances both investigative in nature and compiled for law enforcement purposes. Thus, to the extent the autopsy tapes are made in connection with a pending or prospective law enforcement investigation and their disclosure would constitute an unwarranted invasion of privacy, the agency would be authorized to withhold them from public disclosure under the exemption for certain law enforcement investigative records established in Lodge v. Knowlton, 118 N.H. 574 (1978). For these reasons, the videotape of an autopsy should not be made available for inspection by the public under RSA 91-A:4.

It should be noted, however, that access to such tapes may often be sought for use in civil litigation between private parties, such as a wrongful death action. In such a case, the disclosure of a videotape may nevertheless be permitted if the Division is presented with a waiver of rights executed by the estate or appropriate family member, or if the request is made by counsel through the process of formal civil discovery in a pending legal action.

If you have additional questions on this matter, please let me know.

Very truly yours,



Betsy S. Westgate
Assistant Attorney General
Division of Legal Counsel

BSW:ab

cc: Mr. Richard M. Flynn, Commissioner
#82-118-I